83-100

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOSEPH CIANCAGLINI
and
CHARLES WARRINGTON,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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QUESTIONS PRESENTED FOR REVIEW

* I. Whether this Honorable Court's decision in *Kotteakos v. United States*, 328 U.S. 750 (1946) requires reversal of the Court of Appeals holding "that Congress intended that 'a series of agreements that under pre-RICO law would constitute multiple conspiracies could under RICO be tried as a single "enterprise conspiracy" ' ", under 18 U.S.C. §1962(d).

* II. Whether the phrase "pattern of racketeering activity" under 18 U.S.C. §1962(c) requires that the predicate racketeering acts constituting the pattern of racketeering activity must be related to and with each other by a common nexus, scheme, plan, or motive.

III. Whether the conviction of Petitioner Ciancaglini for a violation of 18 U.S.C. §1962(d) (RICO) conspiracy must be reversed under the decision of the United States Court of Appeals in *United States v. Brown*, 583 F.2d 659 (3d Cir. 1978), cert. denied, 440 U.S. 909 (1979), where the Government failed, as a matter of law, to prove by a sufficiency of the evidence any one of the alleged predicate offenses or the collection of an unlawful debt.

* IV. Whether this Honorable Court's Opinion in *Screws v. United States*, 325 U.S. 91 (1945) and *Morrisette v. United States*, 342 U.S. 246 (1952) require reversal of Petitioners' convictions of Count I, a RICO conspiracy, for the failure of the trial judge to submit to the jury the essential elements of the crime of an illegal enterprise conspiracy, in accordance with this Honorable Court's decision in *United States v. Turkette*, 101 S.Ct. 2524 (1981).

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* Petitioner Warrington joins in issues I, II, and IV only.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983 No.

JOSEPH CIANCAGLINI,
and
CHARLES WARRINGTON,
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v.

UNITED STATES OF AMERICA
Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit issued on May 20, 1983.

OPINION BELOW

The Opinion of the Court of Appeals below (Appendix A, infra pp. 1A-37A) is reported in ____ F.2d ____ .

JURISDICTION

The judgment of the panel of the Court of Appeals was entered on May 20, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fifth and Sixth Amendments to the United States Constitution. The statutes involved are: 18 U.S.C. §1961, 1962, 894 and 1955, which statutes are set forth in Appendix B-1-2-3-4 at Appendix pp. A-38-A-44, infra.

STATEMENT

The instant case involves a charge under 18 U.S.C. §1962(d) (RICO) that 23 persons had co-conspired, as an illegal association in fact, i.e., an illegal enterprise to conduct or participate directly or indirectly in the conduct of such enterprise's affairs "through a pattern of racketeering activity or collection of an unlawful debt", in violation of 18 U.S.C. §1962(c). The 23 persons were charged with having committed a mass of diverse racketeering acts, within the meaning of 18 U.S.C. §1961(1) over a six year period, from January 1972 to June of 1978. In addition, the 23 persons were charged with committing 41 separate overt acts, in furtherance of the alleged illegal conspiracy.

Seven of the co-conspirators, including petitioners Ciancaglini and Warrington, were brought to trial under the aforesaid charges.[1]

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1. Count I of the indictment set forth the RICO conspiracy, in which all the defendants were charged. It alleged eight predicate offenses and forty-one overt acts committed in furtherance of the RICO conspiracy. Count II charged Ciancaglini and Warrington with violating the federal gambling statute, 18 U.S.C. §1955, by conducting the Reed Street craps game. Count III charged Ciancaglini, the Riccobenes and Bongiovanni with violating the federal gambling laws by conducting their 1977 numbers operation. Trial was before a jury, and lasted approximately one month, from April 13 to May 10, 1982. Appellants were all convicted on Count I. Warrington was convicted on Count II, but Ciancaglini was acquitted of this charge. On Count III, Ciancaglini, the Riccobenes and Bongiovanni were all found guilty. After sentencing, each appellant

There was no single racketeering predicate offense in which all of the co-defendants participated together. There was no single predicate offense in which all of the co-conspirators participated.

The illegal enterprise conspiracy theory was the linchpin through which the Government sought to tie together separate and distinct acts of racketeering[2] and separate and distinct defendants who had allegedly committed the acts of racketeering.

NOTE 1 — (Continued)

filed a timely notice of appeal. The Court of Appeals for the Third Circuit affirmed.

Petitioner Ciancaglini was sentenced on Count I to ten years imprisonment and a $10,000 fine, and on Count III to five years in prison, sentence suspended and in lieu thereof, five years probation to commence on his release from the imprisonment charged on Count I. Petitioner Warrington was sentenced to ten years imprisonment and $10,000 fine on Count I and five years consecutive probation on Count II.

2. The predicate offenses charged against each appellant were as follows:

Ciancaglini — extortionate credit transactions, mail fraud, collection of an unlawful debt, and operation of three separate illegal gambling activities (Reed Street craps game, 1976 numbers operation, 1977 numbers operation).

Harry Riccobene — extortionate credit transaction, collection of unlawful debt, and operation of illegal gambling business (1977 numbers operation).

Mario Riccobene — extortionate credit transaction and operation of illegal gambling business (1977 numbers operation). Mario was originally charged with collection of unlawful debt as an additional predicate offense, but that charge was dismissed at the conclusion of the government's case at trial.

Warrington — wire fraud, and three separate gambling operations (Reed Street craps game, Andalusia craps game and 1978 numbers operation).

Bongiovanni — collection of unlawful debt and operation of illegal gambling business (1977 numbers operation) (See App. A, pp A-1-A-37)

One defendant was acquitted by the trial judge at trial. A second defendant died while the appeal was pending and the Court of Appeals vacated his conviction.

The petitioners asserted below that the trial en masse for the conglomeration of separate and distinct offenses allegedly committed by 23 co-conspirators over a period of six years violated directly "the right not to be tried en masse and the right to have their guilt determined individually and personally." These basic rights were enunciated by this Honorable Court in *Kotteakos v. United States*, 328 U.S. 750 (1946).

The Court of Appeals rejected petitioners' assertion and held that "a series of agreements that under pre-RICO law would constitute multiple conspiracies, could under RICO be tried as a single enterprise conspiracy." The petitioners seek a writ of certiorari challenging this holding of the Court of Appeals, and assert that this holding is contrary to the fundamental principles of law as enunciated in *Kotteakos v. United States, supra*. (See Appendix A, App. p. A-21).

Petitioner Ciancaglini also asserted below that his conviction on Count I had to be set aside under *United States v. Brown*, 583 F.2d 659 (3d Cir. 1978), cert. denied, 440 U.S. 909 (1979). The jury acquitted petitioner Ciancaglini of the substantive crime of conducting a gambling operation, i.e., the Reed Street craps game. The same accusation, i.e., the Reed Street craps game, formed the basis for one of the predicate offenses under Count I, the RICO conspiracy count. Because there was a general verdict by the jury, and because the jury could have improperly relied on the Reed Street craps game as a basis for their verdict of guilty for Count I, petitioner sought reversal before the Court of Appeals.

The Court of Appeals held that the acquittal on Count II served "a function analogous to a special interrogatory" and "there is no reason for this Court to assume now that the jury returned inconsistent verdicts by relying on that charge as a basis for the RICO verdict". (See Appendix A, App. A-31). The Court of Appeals reached its holding without taking cognizance of the trial judge's ruling on post-trial motions that the jury

could have in fact used the Reed Street craps game as a predicate racketeering act as a basis for a finding of guilty of Count I. (See Appendix C-1, App. p. A-46). The petitioner Ciancaglini seeks a writ of certiorari challenging this holding of the Court of Appeals as being contrary to *United States v. Brown, supra.*

Petitioner Ciancaglini also asserted below that his conviction of Count I had to be set aside under *United States v. Brown, supra,* since the evidence was insufficient to support a finding by the jury that Ciancaglini was guilty of collection of an unlawful debt.

The Honorable Court of Appeals upheld the collection of the unlawful debt, as a predicate act supporting the conviction of Count I, despite the fact that under the instructions given, the jury could not have found as a matter of fact that said acts took place within five years of the indictment. The Court of Appeals sustained this action on a theory of waiver, even though an objection was in fact made, and even though no objection need have been made. (See Appendix A, App. p A-30). Peitioner seeks a writ of certiorari challenging this holding of the Court of Appeals as being contrary to *United States v. Brown, supra.*

In instructing the jury on the elements of an illegal enterprise conspiracy the trial judge, as to Count I, violation of 18 U.S.C. §1962(d) (RICO), failed to instruct on the essential elements of the illegal enterprise conspiracy, to wit: the elements of the "ongoing organization", "continuing membership", and "separate existence". The petitioners challenge this action as contrary to this Honorable Court's holding in *United States v. Turkette,* 101 S.Ct. 2524 (1981), and seek a writ of certiorari to review said rule. (See Appendix C-6, App. p. A-52-A-56).

REASONS FOR GRANTING THE WRIT

ISSUE I

This case presents squarely the issue of whether this Honorable Court's decision in *Kotteakos v. United States*, 328 U.S. 750 (1946) requires reversal of the Court of Appeals holding "that Congress intended that 'a series of agreements that under pre-RICO law would constitute multiple conspiracies could under RICO be tried as a single "enterprise" conspiracy' if the defendants have agreed to commit a substantive RICO offense". (See, Appendix A, App. p. A-21).

The Court of Appeals' decision that a "series of agreements that under pre-RICO law would constitute multiple conspiracies could, under RICO, be tried as a single 'enterprise' conspiracy", raises fundamental, substantial and critically important questions concerning the administration of criminal justice in the federal courts. This Honorable Court has not passed upon the right (in a RICO conspiracy case) of criminal defendants, as enunciated by Mr. Justice Rutledge, in *Kotteakos v. United States*, 328 U.S. 750, 775, i.e., "the right not to be tried *en masse* for the conglomeration of distinct and separate offenses committed by others".

The rule adopted by the Honorable Court of Appeals was recognized by that Court as "a matter of *first impression*" in the Third Circuit.

The contours of the multiple conspiracy doctrine embodied in *Kotteakos*, *supra*, and as applied to RICO conspiracy cases by the various circuits, are "less than clear". See, *United States v. Boffa*, 513 F.Supp. 444 (D. Del. 1980), at 472. Much of the confusion surrounding the issue has been generated by the decision of the Fifth Circuit in *United States v. Elliott*, 511 F.2d 880 (5th Cir.), cert. denied, 430 U.S. 953 (1979) in which the Court held that RICO had displaced many of the conventional legal theories applied to concerted criminal ac-

ventional legal theories applied to concerted criminal action. 571 F.2d at 900. The *Elliott* court concluded that the effect of RICO was "to free the government from the strictures of the multiple conspiracy doctrine and to allow the joint trial of many persons accused of diversified crimes". 571 F.2d at 900.

Through its expansive reading of the RICO conspiracy provision in *Elliott, supra*, the Fifth Circuit purported to create a new species of concerted action, self-styled the "enterprise conspiracy". Under this new formulation, a defendant who aligns himself with, and commits two predicate acts in furtherance of an enterprise, may be charged with a conspiracy which includes crimes committed by other unrelated co-defendants who are employed by or associated with the same enterprise, even though the defendant neither authorized nor adopted the actions of his co-defendants, and did not have a stake in the outcome of the other predicate acts, and the other acts did not logically follow from the crimes upon which the defendant agreed to embark. Under the rubric of the "enterprise conspiracy" concept the Fifth Circuit has eliminated the constraints on conspiracy law imposed by this Honorable Court in *Kotteakos*.

To add to the confusion surrounding the question of the limits placed by *Kotteakos, supra*, on multiple conspiracies being tried under RICO as a single enterprise conspiracy, the Court of Appeals for the Fifth Circuit in *United States v. Sutherland*, 656 F.2d 1181 (5th Cir. 1981) cert. denied, 455 U.S. 949 (1982), purported to modify its rationale in *Elliott, supra*. The "new" rationale advanced under *Sutherland, supra*, by the Fifth Circuit, was that "the defendants in *Elliott* could not have been tried on a single conspiracy count under pre-RICO law because the defendants had not agreed to commit any particular crime." They were properly tried under RICO only because the evidence established "an agree-

ment to commit a substantive RICO offense," i.e., an agreement to participate in an enterprise through a pattern of racketeering activity. The Court of Appeals for the Third Circuit expressly adopted this "new rationale" of *Sutherland* in affirming the convictions in the case at bar. (See, Appendix A, App. pp. A-20-A-21).

The rationale of *Elliott*, of *Sutherland* and *United States v. Ciancaglini*, the case at bar, misses the vital heart, soul, and spirit of this Honorable Court's decision and holding in *Kotteakos v. United States, supra.* The rationale of said decisions is not only in direct variance with the holding of the decision of this Honorable Court in *Kotteakos v. United States, supra*, but is a retreat and abandonment of one of the most vital and fundamental rights of an accused, so succinctly and eloquently stated by Mr. Justice Rutledge in *Kotteakos*, i.e., ". . . the right not to be tried *en masse* for the conglomeration of distinct and separate offenses committed by others . . .".

In *Kotteakos*, Mr. Justice Rutledge stated, in pertinent part, as follows:

> *"Numbers are vitally important in trial, especially in criminal matters. Guilt with us remains individual and personal, even as respects conspiracies. It is not a matter of mass application.*
>
> * * *
>
> We do not think that either Congress . . . or this Court . . . intended to authorize the Government to string together for common trial, eight or more separate and distinct crimes, conspiracies in kind though they might be . . . *But if the practice here followed were to stand, we see nothing to prevent its extension to a dozen, a score, or more conspiracies and at the same time to scores of men involved, if at all, only separately to them.* The dangers of transference of guilt from one to another across the line separating conspiracies, subcon-

sciously or otherwise, are so great that no one really can say prejudice to substantial rights has not taken place.

* * *

That right, in each instance, was the right not to be tried en masse for the conglomeration of distinct and separate offenses committed by others.

* * *

We have not rested our decision particularly on the fact that the offense charged, and those proved, were conspiracies. That offense is perhaps not greatly different from others when the scheme charged is tight and the number involved small. But as it is broadened to include more and more, in varying degrees of attachment to the confederation, the possibilities for miscarriage of justice to particular individuals become greater and greater".

328 U.S. at 772-773, 774-775, 776. (Emphasis added).

The rationale of the Third Circuit Court of Appeals, in the case at bar, has completely ignored the vital heart, soul and spirit underlying the holding of this Honorable Court in *Kotteakos v. United States, supra*. In the case at bar, as in *Kotteakos v. United States, supra*, "numbers are vitally important", "guilt remains individual and personal", even with respect for alleged RICO conspiracies. In the case at bar, as in *Kotteakos*, the fundamental and underlying right violated, to which violation the Court of Appeals added its imprimatur by affirmance based on the *Sutherland* rationale, was the right not to be tried *en masse*. In the case at bar, as in *Kotteakos*, the decision to reverse the conviction should not rest on the fact that the offense charged and those proved were conspiracy, rather, *Kotteakos* mandates the reversal of the conviction in the case at bar, for violating the right not to be tried *en masse*, which resulted in a miscarriage of justice to petitioners herein.

The case at bar also raises issues of constitutional dimensions. While this Honorable Court in Kotteakos based its decision in part on the intent of Congress, it seems clear from the above language from *Kotteakos*, quoted above, *supra*, that the decision had a constitutional basis as well: the double jeopardy clause of the Fifth Amendment and the Sixth Amendment right of confrontation. Neither the RICO conspiracy provisions of the statute, nor the legislative history demonstrate a congressional intent to expand the scope of conspiracy law beyond that which was delineated by this Honorable Court in *Kotteakos, supra*.[3]

The requirements of *Kotteakos, supra*, remain today the same bulwark, in support of the right not to be tried en masse for a conglomeration of distinct and separate offenses committed by others, as it was when originally enunciated by this Honorable Court by Justice Rutledge in 1946. This Honorable Court should reinforce the great principle enunciated in *Kotteakos* by clearly stating that *Kotteakos* does not permit a series of agreements that unde pre-RICO would be multiple conspiracies to be tried as a single RICO enterprise conspiracy.

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3. See, Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 Iowa L. Rev. 837, 877, 878-879 (1980); See also, Note, *Elliott v. United States: Conspiracy Law and the Judicial Pursuit of Organized Crime through RICO*, 65 Virginia L. Rev. 109, 123-127 (1970); Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 Fordham L. Rev. 165, 245-251, 254-256 (1980); Tarlow, *The Expanding Universe of RICO*, May 1983, "The Champion", National Association of Criminal Defense Lawyers.

REASONS FOR GRANTING THE WRIT

ISSUE II

A related issue to Issue I raised herein is whether the phrase "pattern of racketeering activity" under 18 U.S.C. §1962(c) requires that the predicate racketeering be related to each other by a common scheme, nexus, plan or motive.

The legislative history of the Act is quite definitive in expressing Congress' belief that the predicate racketeering acts charged in support of a RICO conspiracy must not be separated or isolated, but must constitute "a continuing activity". See, 116 Cong. Rec. 18940 (1970) (Remarks of Senator McClellan).

The courts which have directly considered the question are in conflict. The Court of Appeals for the Seventh Circuit in *United States v. Kaye*, 556 F.2d 855 (7th Cir. 1977), held that the Government must prove the interrelatedness of the predicate acts beyond a reasonable doubt. In *United States v. Stofsky*, 409 F. Supp. 609 (S.D. N.Y. 1973), the court held that the predicate offenses must be connected with each other by some common plan, scheme, or motive in order to be a pattern, and could not be merely disconnected acts. See also, *United States v. Witherspoon*, 581 F.2d 595, 601 (7th Cir. 1978); *United States v. White*, 386 F. Supp. 882, 883-884 (E.D. Wis. 1974); *United States v. Cryan*, 400 F. Supp. 1234 (D. N.J. 1980).[4]

In the case at bar, the Court of Appeals held, in response to petitioners' argument that the evidence must prove a nexus or connection between the predicate acts of the various defendants to establish a pattern, as follows:

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4. The leading case involving a contrary view is *United States v. Elliott*, 571 F.2d 880, 899, n. 23 (5th Cir.), cert. denied, 439 U.S. 953 (1978); see also, *United States v. DePalma*, 461 F. Supp. 788 (S.D.N.Y. 1978).

> "Each asserts that he was prejudiced by masses of evidence of predicate offenses . . . which were in no way related to him. Inasmuch as we held that a single conspiracy has been shown to have existed, there is no unfair prejudice".
>
> (Appendix A, App. pp. A-24-A-25).[5]

The Court of Appeals for the Third Circuit by this holding has further expanded conspiracy law beyond the intent of Congress and abandoned the classic and traditional right of a defendant to individual determination of guilt and substituted the risk of imposing guilt solely by association because of the impossibility of keeping the proof of the various predicate acts against the various defendants separate both in form and in the jurors' minds.

This Honorable Court warned against this danger in *Kotteakos v. United States*, 328 U.S. 750 (1946). The concept of "enterprise conspiracy", which the Court of Appeals at bar found supplied the pattern of racketeering activity, does nothing to resolve the constitutional problem that prompted this Honorable Court's reversal in *Kotteakos*.

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5. The Court of Appeals' holding is particularly perplexing in the case at bar in view of the trial court's instruction to the jury that the acts of racketeering activity must be connected to each other by some common plan, scheme, or motive. (See, Appendix C-2, App. pp. A-47).

REASONS FOR GRANTING THE WRIT

ISSUE III

The conviction of petitioner Ciancaglini for a violation of 18 U.S.C. §1962 (RICO) conspiracy must be reversed under the decisions of the United States Court of Appeals in *United States v. Brown*, 583 F.2d 659 (3d Cir. 1978), cert. denied, 440 U.S. 909 (1979); *United States v. Tarnopol*, 561 F.2d 466 (3rd Cir. 1977); and *United States v. Dansker*, 537 F.2d 40 (3rd Cir. 1976), cert. denied, 429 U.S. 1038 (1979), where the Government failed, as a matter of law, to prove the sufficiency of *any one* of the alleged predicate offenses, or the collection of an unlawful debt, as alleged in Count I of the indictment.

In the case at bar, the Court of Appeals for the Third Circuit stated, in pertinent part, as follows:

> "Under *United States v. Brown*, 583 F.2d 659 (3rd Cir. 1978), *cert. denied*, 440 U.S. 909 (1979), if a defendant is charged with multiple predicate offenses, the evidence must be sufficient to prove all of them if the court cannot determine which specific offenses the jury relied upon in reaching its verdict. See also, *United States v. Tarnopol*, 561 F.2d 466 (3rd Cir. 1977); *United States v. Dansker*, 537 F.2d 40 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1979)."
>
> (Appendix A, App. p. A-26).

(A) *THE REED STREET CRAPS GAME*

As to the Reed Street Craps Game, the Court of Appeals held:

> "The final predicate offense charged against Ciancaglini was participation in the running of the Reed Street craps game. This accusation also formed the basis for the charge in Count II of the indictment — violation of the federal gambling stat-

ute (18 U.S.C. §1955). Since the jury acquitted Ciancaglini on Count II, he now argues that the acquittal establishes that reliance on the Reed Street game as a predicate offense would have been improper. Because the jury returned only a general verdict of guilty on the RICO conspiracy charge, there is no way to determine if it did in fact bottom its verdict on the Reed Street activities. Accordingly, Ciancaglini asks that we reverse his RICO conviction on the basis of the *Brown* doctrine.

The jury in the present case *acquitted* Ciancaglini of the substantive crime of conducting an illegal gambling operation, which is prohibited by 18 U.S.C. §1955. The predicate offense alleged in connection with the Reed Street game is that Ciancaglini "would and did" violate 18 U.S.C. §1955. Thus, the verdict of acquittal on Count II serves a function analogous to that of a special interrogatory. *Inasmuch as the jury stated affirmatively that it did not believe beyond a reasonable doubt that Ciancaglini had violated the federal gambling law, there is no reason for this Court to assume now that the jury returned inconsistent verdicts by relying on that charge as a basis for the RICO verdict.* For this reason, *Brown* does not require that the conspiracy conviction here be reversed." (Emphasis supplied).

(Appendix A, App. pp. A-30-A-31).

The Court of Appeals erred in that the jury *was permitted in fact* to rely on the 'Reed Street craps game' by the trial judge[6] for their verdict of guilty on the

6. The trial judge in fact ruled in post-trial review of the conviction on the RICO conspiracy count, as follows:

"The jury did not return a verdict of guilty as to the Reed Street craps game under Count Two. That does not mean though that the jury could not have found that some overt act was not committed by him with respect to the Reed Street craps game for the purposes of Count One."

[Appendix C-1, App. p. A-46).

(RICO) conspiracy count (Count I). Because the jury was not, as a matter of law,[7] permitted to rely on the 'Reed Street craps game', but *in fact did or could have* relied on the 'Reed Street craps game', on the instructions as given, the conviction of petitioner under Count I, (RICO) conspiracy, must be reversed under the decision in *Brown, supra*.

B. *COLLECTION OF AN UNLAWFUL DEBT*

As to the predicate acts of extortionate credit and collection of an unlawful debt, the Court of Appeals for the Third Circuit stated, as follows:

> "Ciancaglini raises a separate challenge to the jury's possible finding that he was involved in the collection of an unlawful debt. He claims that the district court gave inconsistent instructions to the jury on the issue of collection of an unlawful debt. At one point during the charge, the court stated that the collection of an unlawful debt could not serve as a predicate offense if more than five years old and at another point told the jury it could consider the collection of the Wilmerton debt, which seems to have occurred more than five years earlier. Ciancaglini did not, however, object to the jury instructions or request that the Court withdraw the Wilmerton loan charge from consideration by the jury because it was time-barred. He also did not raise the issue in his motion for judgment of acquittal. Consequently, he cannot now raise this issue.
> (See Appendix A, App. p.A-30).

Under the instructions given to the jury by the trial judge, there was no evidence presented upon which the jury could have concluded that the collection of the unlawful debt, alleged as a basis and predicate act in support of the RICO conspiracy, in fact occurred within five

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7. See, *Sealfon v. United States*, 332 U.S. 575 (1947).

years of the date of the indictment.[8] In fact, the evidence showed that the collection of the unlawful debt occurred more than five years before the date of the indictment.

The waiver theory was, that because the trial judge at another point in his charge had instructed the jury that they could consider the collection of an unlawful debt,[9] and because this instruction was not objected to, this issue could not be raised before the Court of Appeals.

The Court of Appeals erred. First, trial defense counsel did, in fact, object to the charge of the court regarding collection of an unlawful debt.[10] Second, no objection was necessary because the jury still could not find that the unlawful collection, as a matter of fact, took place within five years of the date of indictment, since there were no facts to support such a conclusion. Since it is clear that both the trial judge and the Court of Appeals allowed the jury to premise its verdict of guilt of Count I on the collection of an unlawful debt, and since, as a matter of law, the jury should not have been permitted to do so, reversal of Count I, the RICO conspiracy, is required under *United States v. Brown*, *supra*.

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8. The trial judge specifically instructed the jury: "The collection of an unlawful debt only gives rise to criminal liability if the collection occurred within five years of the date of the indictment".

He further instructed:

"The act of debt collection must have occurred after February 18, 1976" He further instructed that petitioner Ciancaglini was charged with "collecting through extortionate means loans and interest due from Russell Wilmerton on or about January 1973 to on or about June 1974".

(Appendix C-3, App. p. A-48.)

9. See Appendix C-3, App. p. A-48.

10. See Appendix C-4, App. p. A-49 where trial defense counsel specifically said "I object to the charge, Your Honor".

REASONS FOR GRANTING THE WRIT

ISSUE IV

This case raises squarely for decision whether this Honorable Court's Opinion in *Screws v. United States*, 325 U.S. 91 (1945) and *Morrisette v. United States*, 342 U.S. 246 (1952), require reversal of petitioner's conviction of Count I, a RICO conspiracy, for the failure of the trial judge to submit to the jury the essential elements of the crime of an enterprise conspiracy, in accordance with this Honorable Court's decision in *United States v. Turkette*, 101 S.Ct. 2524 (1981).

Both *United States v. Screws*, *supra*, and *Morrisette*, *supra*, mandate reversal of the conviction where essential elements of the offense are not submitted to the jury.[11] The heart of the theory underlying these cases is succinctly stated by Justice Douglas in the *Screws* Opinion, *supra*, where he stated, as follows:

> "It is true that no exception was taken to the trial court's charge. Normally we would under those circumstances not take note of the error . . . But there are exceptions to that rule . . . *And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion.* Even those guilty of the most heinous offenses are entitled to a fair trial. Whatever the degree of guilt, those charged with a federal crime are entitled to be

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11. The case at bar counsel for one of the co-defendants of petitioner did in fact state an objection, although somewhat inarticulately, relating to proof of the enterprise. See, Appendix C-5, App. p. A-51.

It has been held that an objection by a co-defendant is sufficient to preserve an error. *United States v. White*, 589 F.2d 1283, 1290, n. 14 (5th Cir. 1979); See also, *United States v. Davis*, 583 F.2d 190, 194-195 (5th Cir. 1978); and *Brown v. Atemco Investment Corp.*, 603 F.2d 1367 (9th Cir. 1979).

tried by the standards of guilt which Congress has prescribed."

At bar, the trial judge failed to instruct on the essential elements of an enterprise, as defined by this Honorable Court in *United States v. Turkette, supra*, and as cited with approval and applied by the Court of Appeals in the case at bar.[12]

The Court of Appeals for the Third Circuit stated, in pertinent part, as to the elements of an enterprise, as follows:

> "To avoid these dangers, the *Turkette* Court provided a definition of "illegal enterprise" for RICO purposes. It set forth the elements necessary to establish the existence of such an enterprise: "evidence of an ongoing organization, formal or informal" and "evidence that the various associates function as a continuing unit". 452 U.S. at 583. In addition, the enterprise must be shown to have an existence "separate and apart from the pattern of activity in which it engages". 452 U.S. at 583. The Court stated that "the proof used to establish these separate elements may in particular cases coalesce". 452 U.S. at 583.
>
> Because the issues of ongoing organization, continuing membership and separate existence are questions of fact, *they must be resolved in the first instance by the jury*. (Emphasis added)
> (See Appendix A, App. p. A-14).

At bar, the jury did not resolve in the first instance the issues of "ongoing organization, continuing membership, separate existence", the essential elements of

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12. Pertinent portions of the trial judge's instructions on the meaning of the term "enterprise" are found in the Appendix to this Petition. (Appendix C-6, App. pp. A-52-A-56).

an enterprise, as defined in *Turkette*.[13] The failure of the judge to submit these essential elements of the enterprise to the jury under *Screws* and *Morrisette*, *supra*, is fundamental error and requires reversal even on this Honorable Court's own motion. See, *Screws v. United States*, *supra*. Consequently, the writ of certiorari should be granted.

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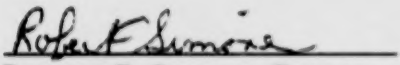
13. In the case at bar, petitioner and his co-defendants were charged in Count I of the indictment with an illegal RICO enterprise conspiracy, in violation of 18 U.S.C. §1962(d). The petitioners alleged before the Court of Appeals that the evidence on the instructions given by the trial judge was insufficient to establish the existence of the alleged enterprise. The Court of Appeals, in sustaining the sufficiency of the evidence, as to the enterprise, did so, based upon the premise that the factual issue, i.e., the essential elements of an illegal enterprise, had been submitted to the jury in the first instance. In fact, the essential elements of an illegal enterprise, as defined in *United States v. Turkette*, *supra*, and as approved by the Court of Appeals in this case, were not in fact submitted to the jury. The petitioner failed to raise this issue directly before the Court of Appeals for the Third Circuit. In view of this Honorable Court's holdings in *Screws v. United States* and *Morrisette v. United States*, *supra*, petitioners respectfully submits the instant error upon petition for certiorari to this Honorable Court.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be granted.[14]

Respectfully submitted,



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On the Petition

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14. The errors alleged pertain specifically to Count I of the indictment. Count II, of which Petitioner Warrington was convicted, and Count III, of which Petitioner Ciancaglini was convicted, were also alleged as predicate acts under Count I. If there is reversal on any of the errors alleged, the convictions as to Count II, Warrington, and Count III, Ciancaglini, must also be reversed and a new trial awarded, since the prejudice clearly would have carried over.

APPENDIX "A"

OPINION OF THE COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 82-1399 and 82-1410/11/12/13/14

UNITED STATES OF AMERICA

v.

MARIO RICCOBENE,
Appellant in No. 82-1399

v.

JOSEPH CIANCAGLINI,
Appellant in No. 82-1410

v.

CHARLES WARRINGTON,
Appellant in No. 82-1411

v.

PASQUALE SPIRITO,
Appellant in No. 82-1412

v.

JOSEPH BONGIOVANNI,
Appellant in No. 82-1413

v.

HARRY RICCOBENE,
Appellant in No. 82-1414

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Crim. Nos. 81-00049-04/05/06/07/08/09

Argued March 16, 1983

Before: ADAMS and HUNTER, *Circuit Judges* and ACKERMAN, *District Judge**

(Filed May 20, 1983)

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*Honorable Harold A. Ackerman, United States District Court for the District of New Jersey, sitting by designation.

OPINION OF THE COURT

ADAMS, *Circuit Judge*.

The appellants in this case challenge their convictions under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961 et seq. ("RICO"), and the federal gambling statute, 18 U.S.C. §1955. Their primary argument is that the evidence failed to show beyond a reasonable doubt either that they were engaged in the conduct of a single on-going enterprise, as required for the RICO count for which they were convicted, or that their activity constituted a single conspiracy. They also contend that the jury could not properly have found that each appellant committed the acts charged against him as predicate offenses of the RICO count. In addition, various appellants raise the following claims individually: that the evidence as to particular counts was insufficient; that the district court committed reversible trial errors; that certain confidential attorney-client communications were intercepted by the F.B.I. wiretaps; and that RICO violates both the fifth and eighth amendment rights of the appellants by permitting the imposition of unjustifiably harsh sentences. After considering all of the contentions raised by each defendant, we conclude that the evidence was sufficient in all respects and that no reversible errors were committed by the district court. Accordingly, the convictions will be affirmed.

I.

This RICO case involves a number of persons who were members of an alleged "crime family" in Philadelphia. The government asserts that during the period covered by the indictment, 1972 to 1978, there existed an on-going criminal enterprise, implicating each of the defendants, and that this enterprise engaged in activities that included illegal gambling, mail fraud, wire fraud, extortionate credit transactions and collection of unlaw-

ful debts. At trial, the bulk of the evidence consisted of tape recordings of conversations among the co-conspirators that were intercepted by government wiretaps at three locations: Frank's Cabana Steak House, the Tyrone DeNittis Talent Agency; and the C. Warren Check Cashing Company. The transcripts of these tapes fill eight volumes.

A. *The Participants in the Enterprise*

Angelo Bruno, a named co-conspirator, headed the enterprise; the "underboss" was co-defendant Philip Testa. Supervisors in the enterprise, who worked under Testa, included appellant Harry Riccobene, co-defendants Frank Narducci and Carl Ippolito, and co-conspirators Nicodemo Scarfo, John Simone and Frank Sindone. Appellant Joseph Ciancaglini was, to a lesser extent, part of the core group of the organization. He appears to have worked for Sindone, the most active of the supervisors, to oversee many of the gambling operations of the enterprise.

The other appellants were not major figures in the overall operation of the organization. Mario Riccobene was a partner of his half-brother Harry in the loansharking and numbers businesses that they operated out of the De Nittis Talent Agency in South Philadelphia; Mario also appears to have served occasionally as Bruno's driver. Joseph Bongiovanni worked for the Riccobenes.

Charles Warrington and Pasquale Spirito, the final two appellants, had virtually no direct contact with the Riccobenes and Bongiovanni. Warrington ran various gambling operations, both numbers and craps games, at which Spirito worked.[1] These operations were super-

1. Pasquale Spirito was killed during the pendency of this appeal. Accordingly, the judgment in 82-1412 will be vacated and that case remanded to the district court with directions to dismiss the indictment. *See United States v. Pauline*, 625 F.2d 685 (5th Cir. 1980); *United States v. Littlefield*, 594 F.2d 682 (8th Cir. 1979); *United States v. Bechtel*, 547 F.2d 1374 (9th Cir. 1977).

vised by Ciancaglini, who also oversaw the Riccobenes' numbers game.

By the time the trial took place, a number of the co-conspirators and defendants had been killed, including Bruno, Testa, Narducci, Sindone and Simone; Ippolito was declared incompetent to stand trial; and Scarfo is in federal custody on unrelated charges.[2]

B. *The Activities*

The indictment charges that the "pattern of racketeering activity" in this case is demonstrated by eight predicate offenses committed by various appellants. Some of these activities implicate just one appellant, acting with other co-conspirators. There is no single predicate offense in which all the appellants participated together.[3]

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2. A final defendant, Frank Primerano, was acquitted by the court at the close of evidence.

3. The predicate offenses charged against each appellant were as follows:

Ciancaglini — extortionate credit transactions, mail fraud, collection of unlawful debt, and operation of three separate illegal gambling activities (Reed Street craps game, 1976 numbers operation, 1977 numbers operation).

Harry Riccobene — extortionate credit transaction, collection of unlawful debt, and operation of illegal gambling business (1977 numbers operation).

Mario Riccobene — extortionate credit transaction and operation of illegal gambling business (1977 numbers operation). Mario was originally charged with collection of unlawful debt as an additional predicate offense, but that charge was dismissed at the conclusion of the government's case at trial.

Warrington — wire fraud, and three separate gambling operations (Reed Street craps game, Andalusia craps game, and 1978 numbers operation).

Bongiovanni — collection of unlawful debt and operation of illegal gambling business (1977 numbers operation).

1. *Chestnut Hill Lincoln Mercury Dealership*

Three of the predicate offenses charged against appellant Ciancaglini arose from activities connected with the Chestnut Hill Lincoln Mercury car dealership. Harry Brown, the general manager of the dealership, testified that since 1969 he had borrowed money from Frank Sindone at a rate of 2½% interest per week. After a time, Brown, with the permission of Testa and Sindone, lent money to Russell Wilmerton at unlawfully high interest rates. When Wilmerton could not repay the loan, Brown, Ciancaglini and another man went to his house twice. Ciancaglini remained silent as the other men threatened Wilmerton. Ciancaglini later told Harry Riccobene that he had gone to Wilmerton's house to help collect the debt. The collection of the Wilmerton debt is the basis for the racketeering acts of extortionate credit and unlawful debt collection charged against Ciancaglini.

Ciancaglini attended a meeting with Brown, Testa, Sindone and Brown's employer to discuss methods of generating cash so that Brown could repay some of his loans to Testa and Sindone. Brown proposed the staging of a robbery at the car dealership. Sindone and Testa agreed, and as part of the scheme, arranged that Ciancaglini be given a car free of charge. The records of the business were altered to show that Ciancaglini paid $3,000 in cash for the car on the day of the robbery, although he had in fact paid nothing. The dealership reported the robbery to the police and to its insurance carrier, claiming the $3,000 supposedly paid by Ciancaglini as part of the loss; the carrier paid the claim. When questioned by the police, Ciancaglini falsely stated that he had paid that amount of cash for the automobile, and that he knew nothing of the robbery. This scheme is the basis for the mail fraud claim against Ciancaglini as a predicate offense to the RICO conspiracy.[4]

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4. Harry Brown has previously been convicted for his participation in these activities. *See U.S. v. Brown*, 583 F.2d 659 (3d Cir. 1978), *cert. denied*, 440 U.S. 909 (1979).

2. *The Numbers Operations*

In 1976, Ciancaglini, Sindone and Testa managed an illegal numbers operation which they discussed in several intercepted conversations. Ciancaglini also had conversations, which were recorded, with persons working for him concerning this operation. He discussed the accounts with Sindone and Testa and described his own role as collecting the money from the game. He referred to Sindone as his "boss." This operation formed the basis for one of the predicate offenses charged against Ciancaglini.

Between September and November 1977, Harry and Mario Riccobene conducted a numbers operation. At trial, a government expert testified that, in his estimation, more than 35 persons ran numbers for the Riccobenes; one was Joseph Bongiovanni, who discussed the numbers operation with Harry Riccobene several times. Ciancaglini was overseeing this business and coordinating the numbers games for the enterprise. He apparently visited the Riccobenes at their offices every Wednesday, and after one such visit he was seen handing a large sum of cash to Angelo Bruno. According to the government's theory of the case, the Wednesday visits were for the purpose of collecting a share of the week's numbers profits. At one of these meetings, Ciancaglini and Harry Riccobene discussed the "cut numbers" problem and the need for a uniform policy.[5] Ciancaglini promised that he would discuss the matter with Sindone, who might then have to go to Bruno to have it resolved. This numbers operation was one of the predicate offenses charged against the Riccobenes, Ciancaglini and Bongiovanni. It was also the basis for

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5. The government's brief states that " 'cut numbers' are numbers that are played more often than other numbers, and on which the payoff to the bettor is 'cut' to a level lower than the usual 600 to 1 payoff." *Govt. Br.* at 25 n.22.

the substantive crime of illegal gambling charged against these four in Count III of the indictment.

There was evidence that Warrington conducted an illegal numbers operation between April and June 1978. Warrington apparently reported to Ciancaglini and Sindone, and the tapes indicate that on at least one occasion Warrington met with Ciancaglini to straighten out a problem with one of the numbers runners and to "unload" a "two weeks ribbon."[6] This operation formed the basis of one predicate offense for Ciancaglini and Warrington.

3. *Riccobenes' Loan Business*

The wire-tap transcripts contain several conversations between Harry Riccobene and others concerning the loansharking business that Harry Riccobene conducted out of the De Nittis Talent Agency. Bongiovanni proposed various loans and Harry Riccobene set the terms. The usual interest rates for these loans was 5% per week. In one conversation, the two men discussed a customer named Abbotts who had borrowed $1,000, paid back $800 and still owed $400. Bongiovanni then added that Abbotts was to pay $100 per week on his loan, which amounts to an interest rate of 20% every ten weeks, significantly higher than the current prime rate. This and other similar transactions formed the basis for the predicate offense of "collection of unlawful debt" that was charged against Harry Riccobene and Bongiovanni.[7]

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6. A ribbon is a record of wagering activities in a numbers operation.

7. For purposes of RICO, an "unlawful debt" is defined as a debt

> A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of

Intercepted conversations between Mario and Harry Riccobene indicated that these two men threatened their debtors with physical harm if loans were not repaid promptly. On October 17, 1977, the brothers discussed a loan they had made to someone named "Richie," who had not been making his payments. Mario said "I caught that Richie. I almost hit Richie across the f_____ head, that's why he's starting to pay. I caught him in the john over there. . . . I put him in the corner. And I told him if you don't bring $100 a week, the next time I see you, there's no excuse. I'm gonna leave you on the street." These activities of Harry and Mario Riccobene in the fall of 1977 formed the basis for the predicate offense charged against them of collection of credit through extortionate means.

4. *Reed Street Craps Game*

In April, 1976, FBI agents conducted a court-authorized search of 735 Reed Street in Philadelphia. A craps game was apparently being conducted, and 45 people were present. There was gambling paraphernalia and $15,000 cash on the floor. Appellant Warrington was present. In various recorded conversations after this raid, both men indicated that they operated the game along with others. This was not a one-night game, but rather an on-going operation that was not reopened after the raid. An FBI expert testified at trial that, based on a conversation among Testa, Narducci, Ippolito and Sindone, it was his opinion that those four men and Warrington were the people who had a financial interest

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the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate.

18 U.S.C. §1961(6).

in the game. The expert also testified that in an average 6-hour game night, approximately $522,000 would be wagered, generating a profit of between $18,000 and $25,000.

The government contends that Ciancaglini served as the intermediary between Warrington, Narducci, Ippolito and Grande on the one side and Testa and Sindone on the other. Taped conversations indicate that Ciancaglini supervised at least one craps game, but nothing in the portions of the tapes cited by the government in its brief in this Court specifically mentioned the Reed Street game. The Reed Street game was the basis of one predicate offense charged against Warrington and Ciancaglini and it was also charged as a substantive violation of the federal gambling law, 18 U.S.C. §1955, in Count II of the indictment.

5. *The Andalusia Craps Game*

According to the government's expert, Warrington and Ippolito had a financial interest in, and conducted, a craps game in Andalusia, Pennsylvania, which operated in the afternoons and early evenings from 1976 to 1978. The game ran for alternating 5-week periods with a game in Bristol, Pennsylvania run by "guys from Trenton." The Bristol game was raided by the FBI on June 3, 1978. In subsequent conversations, Warrington made clear that he nonetheless intended to reopen the Andalusia Game, stating "They're [the FBI] not gonna stop my f_____ living." The operation of this game formed the basis for one of the predicate offenses charged against Warrington.

6. *The Craps Game Scam*

Warrington and Sindone and three other men set up a phony craps game in New Jersey to cheat a player out of a substantial sum of money. The scam was successful and the man lost $4500. Warrington, in arrang-

ing the scam, stated in an intercepted conversation that Bruno had approved the scam and would intervene if the New York group demanded a share of the profits. This is a reference to an arrangement between the Philadelphia and New York organizations that all New Jersey gambling would be split "50-50." Since the scam was a false, rather than a real operation, Warrington believed that New York was not entitled to its "cut."

In the course of setting up the scam, Warrington placed two recorded phone calls from his office in Pennsylvania to the victim in New Jersey. This wire fraud was one of the predicate offenses charged against Warrington.

C. *Procedural History*

The defendants were indicted by a federal grand jury on February 19, 1981. Count I of the indictment set forth the RICO conspiracy, in which all the defendants were charged. It alleged eight predicate offenses and forty-one overt acts committed in furtherance of the RICO conspiracy. Count II charged Ciancaglini and Warrington with violating the federal gambling statute, 18 U.S.C. §1955, by conducting the Reed Street craps game. Count III charged Ciancaglini, the Riccobenes and Bongiovanni with violating the federal gambling laws by conducting their 1977 numbers operation.

Trial was before a jury, and lasted approximately one month, from April 13 to May 10, 1982. The government's case consisted of lay and expert witnesses and tapes of intercepted conversations among the co-conspirators. Appellants did not put on a defense. They were all convicted on Count I. Warrington was convicted on Count II, but Ciancaglini was acquitted of this charge. On Count III, Ciancaglini, the Riccobenes and Bongiovanni were all found guilty. After sentencing, each appellant filed a timely notice of appeal.

II.

The Racketeer Influenced and Corrupt Organizations Act was enacted "to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." Pub. L. No. 91-452, 84 Stat. 922, 923 (1970). *See* Blakey, "The RICO Civil Fraud Action in Context," 58 N.D. L.Rev. 237, 249-80 (1982) (examining the legislative history of the statute in considerable detail). RICO makes it a federal crime for individuals "employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. §1962(c). Section 1962(d) provides that it is unlawful to conspire to violate Section 1962(c).[8] To establish an "enterprise" conspiracy, the government must prove beyond a reasonable doubt that an "enterprise" did in fact exist, and that the individual defendants knowingly agreed to participate in the "enterprise" through a pattern of racketeering. The appellants in the present case were convicted of violating Section 1962(d) by conspiring to violate Section 1962(c). They argue that the government failed to satisfy its burden of proving such an enterprise conspiracy and that their convictions on Count I must, therefore, be overturned. We conclude that, contrary to the appellants' assertions, the evidence was sufficient to demonstrate that an organization existed which satisfies the requirements for an "enterprise," and that all the members of the conspiracy knowingly agreed to partici-

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8. Section 1962(d) also prohibits conspiracies to violate the other substantive criminal provisions of RICO. Sections 1962 a and (b).

pate in or conduct that enterprise through a pattern of racketeering.

A. *Existence of an Enterprise*

"Enterprise," according to the statute, "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. §1961(4). The Supreme Court has recently held that a completely illegal organization may be an enterprise for RICO purposes. *United States v. Turkette*, 452 U.S. 576 (1981); *see also United States v. Provenzano*, 620 F.2d 985, 992-93 (3d Cir.), *cert. denied*, 449 U.S. 899 (1980). The *Turkette* Court recognized that RICO's primary purpose is to "address the infiltration of legitimate business by organized crime," 452 U.S. at 591, but determined that it was not inconsistent with this purpose to read the plain language of the statute to punish the activities of illegal organizations even before that infiltration occurred. This "preventive" function enables federal law enforcement officials "to deal with the problem at its very source." 452 U.S. at 591, 593.

In reaching its conclusion, the Supreme Court was not unmindful of the dangers of its interpretation. 452 U.S. at 582-83. Both judges and commentators had raised the concern that the concept of "illegal enterprise" could be construed quite broadly. Legal scholars had concluded that, without further refinement of the term, the statute could be extended to situations far removed from those actually contemplated by Congress, and that federal prosecutors could use the law to invoke an additional penalty whenever they had a case involving the commission of two offenses that, coincidentally, were among those listed as "racketeering activities." *See United States v. Anderson*, 626 F.2d 1358 (8th Cir. 1980), *cert. denied* 450 U.S. 912 (1981); *United States v. Sutton*, 605 F.2d 260 (6th Cir. 1979) *rev'd en banc*,

642 F.2d 1001 (6th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981); Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 Iowa L. Rev. 837 (1980); Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 Fordham L. Rev. 165 (1980).

To avoid these dangers, the *Turkette* Court provided a definition of "illegal enterprise" for RICO purposes. It set forth the elements necessary to establish the existence of such an enterprise: "evidence of an ongoing organization, formal or informal" and "evidence that the various associates function as a continuing unit." 452 U.S. at 583. In addition, the enterprise must be shown to have an existence "separate and apart from the pattern of activity in which it engages." 452 U.S. at 583.[9] The Court stated that "the proof used to establish these separate elements may in particular cases coalesce." 452 U.S. at 583.

Because the issues of ongoing organization, continuing membership and separate existence are questions of fact, they must be resolved in the first instance by the jury. The scope of our review of factual determinations is, of course, quite limited. We must sustain the jury's verdict "if there is substantial evidence, taking the view most favorable to the Government, to support it." *Glasser v. United States*, 315 U.S. 60, 80 (1942) (citations omitted). We turn now to the facts of the case at hand to consider whether, under the *Glasser* standard,

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9. The Second Circuit has recently held that certain illegal organizations, although satisfying the *Turkette* requirements for "enterprise," are not within the ambit of the RICO statute. In *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983), Judge Friendly concluded that the members of a Croatian nationalist terrorist organization could not be prosecuted under RICO for their participation in that organization since Congress had enacted the statute to prohibit economically motivated activity. Since neither the enterprise nor the predicate offenses have a "financial purpose," the RICO statute was inapplicable to their activities.

the evidence is sufficient to sustain the jury's finding that an enterprise did exist.

Each of the elements enumerated by the Supreme Court describes a separate aspect of the life of the enterprise. The "ongoing organization" requirement relates to the superstructure or framework of the group. To satisfy this element, the government must show that some sort of structure exists within the group for the making of decisions, whether it be hierarchical or consensual. There must be some mechanism for controlling and directing the affairs of the group on an on-going, rather than an ad hoc, basis. This does not mean that every decision must be made by the same person, or that authority may not be delegated.

In the situation before us, there is substantial evidence showing that such a framework did exist. The organization here was a hierarchy presided over by Bruno, with an inner group of advisors and supervisors, and an undisclosed number of lower level associates operating the illegal businesses. Several intercepted conversations illustrate this structure. On November 4, 1977, four of the co-conspirators, Testa, Narducci, Scarfo, and Harry Riccobene, discussed the selection of a new "consigliere," or advisor, for the group.[10] From their con-

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10. The participants in the conversation are designated by their initials: H-Harry Riccobene; PT-Phil Testa; FN-Frank Narducci; NS-Nicky Scarfo. Phrases transcribed phonetically are marked "(PH)."

PT: So what's gonna happen, HARRY? Did you hear anything about the new "Cosig' . . . (PH)?

H: The new what?

PT: The new "Cosig"! The new Consiglieri! (TESTA utters Italian expression . . .) . . . "Menda se vis" . . . (PH).

. . .

FN: He . . . never says nothing to us. I'm "Capi" and don't know. I presume he don't know either.

H: It shouldn't be . . . .

versation. it is apparent that there are regularized roles in the organization. and that the various positions provide their holders with different rights and privileges. such as voting in these elections.

NOTE — *Continued*

PT	I know what the law is HARRY
H	It shouldn't be
NS	The right way should be the right way
PT	Yeah
H	Yeah. If you don't want to get
PT	Everything is changed' I don't know. everbody does what the F obscene they want anymore'
H	No. Nothing changed.
PT	Well.
H	Well. if you don't get "everybody" . . . You get all of the "heads" You know? That's acceptable. And let them vote on it
PT	Yeah. you know why it's acceptable? Because the Capi's are supposed to talk to their men
	. . .
PT	But in your time HARRY. has there ever been more than two candidates? More than one candidate?
H	Never
PT	Usually they chose a guy and that's the end of it
NS	And that's the end of it. It usually works out that way
H	We'd have a "thing" you know. And I would say. ah "I propose NICKY." And you would go. "I second the motion."
FN	All right.
H	Anybody against it?
NS	And that's the end of it
H	You see. it isn't like it used to be. where everybody was invited. Today. it's not gonna be that way. They are only gonna invite certain people. And the certain people are gonna be the ones that are gonna give him the vote.
PT	Right.
H	You follow me?
NS	Uh huh.
H	If it could be like the old days. then you could go around him a little a be ah you know. use the

Another example of the structure of the group is provided by two conversations between Ciancaglini and Harry Riccobene concerning the numbers operation. Riccobene complained about the "cut numbers" problem," and the need for a uniform policy among the operators of numbers games. Ciancaglini promised to take the problem to Sindone, who apparently supervised the games. On his return visit, Ciancaglini reported that he had explained the situation to Sindone, but because of the nature of the matter, Sindone might have to take it to Bruno to be resolved. As with the November 4th conversation, these discussions demonstrate the different roles and responsibilities at various levels of the organization. The evidence is sufficient, therefore, to show an organization with a leader and a group of supervisors, each running his own operations with "his own people," but coordinated with the operations of other supervisors to provide greater profits and fewer conflicts.

The second necessary element for an enterprise under RICO is that "the various associates function as a continuing unit." *Turkette*, 452 U.S. at 583. This does not mean that individuals cannot leave the group or that new members cannot join at a later time. It does require, however, that each person perform a role in the group consistent with the organizational structure established

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power. You talk to all your potential close associates. Then you get the names, nominate somebody. You propose him, I propose this guy. And somebody seconds the motion. And then there is a vote between them. If nobody goes against the guy that is selected it's all over.

FN Over here, he's not even bounded by the cigars. PH He just proposes "A" PH and that's it. Whatever he says.

H That's right, that's what it is.

NS Right.

FN Get the ones that are gonna go that way and that's it.

11 *See* note 5 *supra* & accompanying text.

by the first element and which furthers the activities of the organization. The evidence presented at trial is adequate to establish that the appellants did occupy continuing positions within the group.[12]

Harry Riccobene, in addition to his position as a member of the core group, conducted two individual illegal businesses under the supervision and protection of the organization — a numbers game and a loansharking operation. The evidence also demonstrates that his brother Mario was his partner and that Bongiovanni worked for them. This conduct is consonant with the structure shown under the first element, and the activities of these three in operating the illegal businesses further the enterprise. Harry Riccobene claims to be lending out "their money," a veiled reference to members of the core group, in the loan business, and the numbers game conducted by the Riccobenes, with Bongiovanni's assistance, appears to be one of a series of games coordinated by the core group.[13]

Ciancaglini's role, as indicated by the evidence, was to act as an intermediary between at least one member of the core group, Frank Sindone, and the operations which Sindone oversaw. He also served as a coordinator and money collector for the enterprise's numbers operations. One of the games Ciancaglini supervised was conducted by Warrington. Warrington also conducted two craps games, one at Reed Street and one in Andalusia, which, according to intercepted conversations and expert testimony, were invested in and monitored by the core group. As this brief summary indicates, the actions of Ciancaglini and Warrington are consistent with the organizational structure of the group and serve to benefit the enterprise.

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12. The question whether each appellant knowingly participated in the enterprise is a separate issue, going to individual criminal liability for the conspiracy. This issue will be discussed at pp. 25-32, *infra*.

13. *See* pp. 8-9 *supra*.

The third and final element in establishing the enterprise is that the organization must be "an entity separate and apart from the pattern of activity in which it engages." *Turkette*, 452 U.S. at 583. As we understand this last requirement, it is not necessary to show that the enterprise has some function wholly unrelated to the racketeering activity, but rather that it has an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses. The function of overseeing and coordinating the commission of several different predicate offenses and other activities on an on-going basis is adequate to satisfy the separate existence requirement.[14] As our discussion of the organization in this case has already shown, there is sufficient evidence to find that the enterprise served a clearinghouse and coordination function above and beyond that necessary to carry out any single one of the racketeering activities charged against the individual defendants.

The evidence adduced is adequate to show the existence of each of the three elements identified by the Supreme Court as necessary to establish an enterprise.

B. *Agreement to Participate*

Establishing that an enterprise exists, however, does not end the inquiry in a RICO conspiracy case. In addition, the government must show agreement: that each participant knowingly associated himself with the larger enterprise. Some of the appellants contend that the evidence does not establish a single conspiracy, but

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14. This was in fact the situation presented in *Turkette*. The Supreme Court affirmed the respondent's RICO conviction, which had been based on his "leadership of this criminal organization through which he orchestrated and participated in the commission of the various crimes delineated in the RICO count or charged in the eight preceding counts." *Turkette*, 452 U.S. at 579.

that at best it demonstrates a series of unrelated agreements, each occurring in connection with one or more of the predicate offenses. Therefore, they argue that there was a variance between the offense charged in the indictment and the proof offered at trial which prejudiced substantial rights of the defendants. *See Kotteakos v. United States*, 328 U.S. 750 (1946); *United States v. Camiel*, 689 F.2d 41 (1982). Viewing the evidence in a light most favorable to the government, we conclude that there was no variance from the indictment and that there was sufficient evidence from which the jury could have found that each of the appellants agreed to participate in a single enterprise conspiracy.

The issue of what constitutes a conspiracy under RICO is a matter of first impression in this Circuit but has been actively debated in the Fifth and other Circuits. *See United States v. Brooklier*, 685 F.2d 1208 (9th Cir. 1982), *cert. denied*, 51 U.S.L.W. 3611 (U.S. Feb. 22, 1983); *United States v. Lemm*, 680 F.2d 1193 (8th Cir.), *cert. denied*, 103 S. Ct. 739 (1982); *United States v. Sutherland*, 656 F.2d 1181 (5th Cir. 1981), *cert. denied*, 455 U.S. 949 (1982); *United States v. Lee Stoller Enterprises, Inc.*, 652 F.2d 1313 (7th Cir.), *cert. denied*, 454 U.S. 1082 (1981); *United States v. Elliott*, 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978); *see also* Blakey and Goldstock, *'On the Waterfront': RICO and Labor Racketeering*, 17 Am.Crim.L.Rev. 341, 360-62 (1980). The Fifth Circuit has determined that in enacting section 1962(d) Congress did not radically alter traditional conspiracy doctrine except to the extent that it proposed a dramatically new conspiratorial objective. An agreement merely to commit the predicate offenses would not be sufficient to support a RICO conspiracy. Nor is it sufficient if the defendants merely participate in the same enterprise. *See Sutherland*, *supra*, 656 F.2d at 1192 (explaining *Elliott*). This is so because, under RICO, it is an agreement "to conduct or participate . . . in the conduct of [an] enterprise's activities" through the

commission of predicate offenses that is prohibited, not an agreement to commit a pattern of racketeering activity alone. As stated in Blakey and Goldstock, *supra* at 361: "[T]he key element is proof that the various crimes were performed in order to assist the enterprise's involvement in corrupt endeavors." Consequently, we agree with the Fifth Circuit that Congress intended that "a series of agreements that under pre-RICO law would constitute multiple conspiracies could under RICO be tried as a single 'enterprise' conspiracy" if the defendants have agreed to commit a substantive RICO offense. *Sutherland*, *supra*, 656 F.2d at 1192.

Proof of agreement in a RICO proceeding may be established by circumstantial evidence to the same extent permitted in traditional conspiracy cases. It is well-established that one conspirator need not know the identities of all his co-conspirators, nor be aware of all the details of the conspiracy in order to be found to have agreed to participate in it. *Blumenthal v. United States*, 332 U.S. 539 (1947); *United States v. Simmons*, 679 F.2d 1042, 1050 (3d Cir. 1982); *United States v. Boyd*, 595 F.2d 120 (3d Cir. 1978). Our review of the record convinces us that, viewing the evidence in the light most favorable to the government, there was sufficient evidence from which the jury could have found that each of the appellants understood the scope of the enterprise and knowingly agreed to further its affairs through the commission of various offenses. Having established that a jury could properly have concluded that a single enterprise existed which supervised and coordinated a series of criminal activities, such as gambling and loansharking, it is not difficult for us to reach the conclusion that the jury could have found that each appellant must necessarily have known that the individual operations were supervised or financed, at least in part, through the organizational infrastructure by members of the core group

There can be no doubt that Harry Riccobene was fully aware of the extent of the enterprise with which he was associated. He was a member of the core group, and his statements in intercepted conversations make clear that he had been an active member for at least 40 years. For example, in a conversation with Bongiovanni, he talked about his participation in a 1931 "war" between various factions of the Cosa Nostra. Riccobene then went on to explain why he chose not to become "the boss," and why Bruno was still in power, even though "he don't have the capability."

Evidence of Bongiovanni's knowledge of the scope of the enterprise comes primarily from his discussions with Harry Riccobene. Although Bongiovanni contends that these conversations concerning the group's past indicate merely that he was an amateur historian, the jury could have concluded he was aware of the present implications of that history. In discussing Bruno, for example, both Riccobene and Bongiovanni switch from past to present tense, and then they speak of the proper degree of respect that should be shown to "somebody . . . in that position." In addition, Riccobene told Bongiovanni at another time that "It's their money I lend out. It ain't my money." In other conversations, both men referred to "those guys from Tenth Street."[15] It also appears that Bongiovanni had some contact with Sindone. After the FBI raid at the talent agency, Sindone told Harry Riccobene that Bongiovanni had told him that the agents had mentioned Sindone's name during the raid. It is consistent with the structure of the enterprise that Bongiovanni would have had a relationship with Sindone. Sindone, through Ciancaglini, appears to have supervised the local numbers games, including the Riccobene operation at which Bongiovanni was employed.

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15. The core group met regularly at Frank's Cabana Steaks on Tenth Street in Philadelphia and is referred to throughout the tapes as "Tenth Street" or "the guys from Tenth Street."

From all this, the jury could have concluded that Bongiovanni joined the enterprise knowing that its activities extended far beyond the particular gambling and loansharking operations at which he was employed, even though he might not have been aware of all of the organization's criminal acts or other participants.

Direct evidence demonstrating Mario Riccobene's knowledge of the scope of the conspiracy is more limited. Mario and Harry Riccobene were clearly partners in the illegal numbers and loansharking businesses. They apparently shared the same offices, which were visited with some regularity by higher-ranking members of the enterprise. Mario Riccobene obviously knew these men, serving on occasion as Bruno's driver when Bruno visited other members of the enterprise. He was at Bruno's home at the time of a meeting between co-conspirators Bruno, Testa, Simone and Sindone. Also, after the FBI raided the talent agency, Mario and Harry Riccobene discussed how the federal agents had found out about their operations. Mario stated that "it's just gotta be phone conversations or eavesdropping. . . . *Can't be 10th Street.*" (emphasis added). A reasonable inference from this last statement is that Mario Riccobene knew of the connection between his own operation and the core group who met at Frank's Cabana Steaks. From all of the evidence presented, including the close personal and business relationship between Mario Riccobene and his half-brother Harry, one of the central figures in the enterprise, the jury could have found that Mario knowingly agreed to participate in the enterprise.

There was overwhelming evidence to show that Ciancaglini was aware of the scope of the enterprise. In addition to other activities, he supervised the numbers operations for Sindone, and served as money collector for the numbers game conducted by members of the core group.

There is sufficient evidence from which the jury could have found that Warrington knowingly participated in the enterprise as well. During the craps game scam, he indicated his knowledge of the profit-sharing arrangement between Philadelphia and New York, and that Bruno had told him that, since it was a scam, the 50% rule did not apply. In addition, Warrington was concerned that Simone, a member of the core group, would want a share of the profits and that, in order to avoid trouble, Sindone would order Warrington to give Simone a cut. Sindone was one of the members of the core group who shared with Warrington a financial interest in the Reed Street craps game which Warrington operated. Warrington's demonstrated knowledge of the core group and his statements as to their supervision of his activities provided the jury with sufficient evidence from which to conclude that he was aware of the scope of the conspiracy with which he was associated.

Our review of the evidence has shown that a single enterprise did exist and that each appellant was a knowing member of the conspiracy "to conduct or participate in the conduct of such enterprise's affairs." 18 U.S.C. §1962(c). Appellants put forth two subsidiary arguments under their "multiple conspiracy" claims which we must address before we turn to their remaining contentions. First, at least some of them argue that there was insufficient independent evidence of their participation in the conspiracy to justify the admission of hearsay statements under Federal Rule of Evidence 801(d)(2)(E) by alleged co-conspirators as evidence against them. As the review of the evidence against the appellants has demonstrated, however, it was their own statements that were usually the most incriminating, and certainly provided sufficient evidence of the likelihood of a single conspiracy to justify the admission of their co-conspirators' statements. Second, each asserts that he was prejudiced by the introduction of masses of evidence of predicate offenses and overt acts which were

in no way related to him. Inasmuch as we have held that a single conspiracy has been shown to have existed, there is no unfair prejudice here because all of the evidence went to proving some part of the conspiracy in which each of them participated.

III

In order to obtain a conviction under RICO, the government must show not only that a defendant participated in the operation of a single enterprise, but also that he did so "through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. §1962(c). A pattern is established by proof that the defendant committed two or more predicate offenses — specified illegal acts, prohibited by either state or federal law — which are often associated with organized crime.[16] In the present case four of the appellants were charged with committing

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16 "Racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisons of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment if the act indictable under section 659 is felonious), section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of state or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to inter state transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transpor-

more than the minimum number of two predicate offenses.[17] Three of the appellants, Harry Riccobene, Warrington and Ciancaglini, argue that the jury could not properly have found them to have committed *all* of the predicate offenses with which they were charged, and that their RICO convictions must therefore be reversed.

Under *United States v. Brown*, 583 F.2d 659 (3d Cir. 1978), *cert. denied*, 440 U.S. 909 (1979), if a defendant is charged with multiple predicate offenses, the evidence must be sufficient to prove all of them if the court cannot determine which specific offenses the jury relied upon in reaching its verdict. *See also United States v. Tarnopol*, 561 F.2d 466 (3d Cir. 1977); *United States v. Dansker*, 537 F.2d 40 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1979). In *Brown*, the jury was presented with four acts set forth as predicate offenses in a RICO conspiracy; each act also formed the basis for a separate substantive offense charged against the defendant.[18] The jury convicted on all counts. On appeal,

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tation of stolen property, sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

18 U.S.C. §1961(1).

17. The indictment also charged that Mario Riccobene had committed two racketeering acts and collected an unlawful debt. The unlawful debt charge was dismissed at the conclusion of the government's case. Joseph Bongiovanni was alleged to have committed one racketeering act and to have collected unlawful debt. Because two racketeering acts were not alleged, the jury was instructed that it could convict him of the RICO violation only on the basis of the unlawful debt. *Transcript of charge of the Court* at 114.

18. The defendant in *Brown* was one of the witnesses in the case now before us, Harry Brown, the general manager of Chestnut

this Court overturned the convictions on two of the substantive counts, finding that the conduct charged in those counts did not, as a matter of law, constitute mail fraud. Then, because the Court had no way of ascertaining which of the substantive offenses the jury had relied upon to satisfy the requirement of two predicate racketeering acts for the RICO conspiracy, it overturned the conviction on that count as well, despite the fact that two of the potential predicate offenses still constituted valid bases for the verdict.

The government has argued that, regardless of the merits of their claims, the appellants here have waived their right to object on the *Brown* issue. At trial, the government requested that the court submit special interrogatories to the jury if it returned a verdict of guilty. The interrogatories were designed to establish which of the predicate offenses the jury had relied on to convict the defendants of the RICO offense. Because the defendants objected, the district court did not submit the interrogatories after the general verdict was returned. The government analogizes the objection to "invited error," a doctrine which prohibits a defendant from seeking appellate review of "alleged errors invited or induced by himself." *U.S. v. Lewis*, 524 F.2d 991, 992 (5th Cir. 1975), *cert. denied*, 425 U.S. 938 (1976). If the defendants had allowed the special interrogatories, then there would have been no *Brown* problem presented on appeal.

This argument by the government would appear to overlook one critical element. The government does not contend that the district court erred in refusing the request for interrogatories. It is within the discretion of the

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Hill Lincoln Mercury, was convicted for his part in the extortion of Russell Wilmerton and the scheme to defraud the dealership's insurance carrier by staging a fake robbery. These activities are also the basis for several of the predicate offenses charged against Ciancaglini.

district court to permit special interrogatories and even where the opposing party does not object, the court is not required to submit special questions to the jury. Since the government does not argue that it was an abuse of discretion for the district court to refuse the government's request, we will not impose upon the defendants the harsh penalty of waiver merely for requesting that the district court exercise its discretion in a manner contrary to the government's preferences."

Brown does not require that we reverse the convictions of any defendant when there is sufficient evidence from which the jury could have concluded that he did commit every predicate offense charged against him. Nor does it require reversal when the reviewing court can determine that the jury did not rely on the challenged predicate offense when reaching its verdict on the RICO charge. With these limits on the *Brown* doctrine in mind, we turn to a consideration of the specific claims made by each appellant.

Harry Riccobene was charged with three predicate offenses: extortionate credit, unlawful debt and gambling (numbers operation). He discussed his involvement in each of these activities in conversations that

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19. The district court, in refusing the request for interrogatories, recognized that the Third Circuit has repeatedly stated that the use of special interrogatories is disfavored in criminal cases. *But see* Note, "RICO and the Predicate Offenses," 58 N.D. L. Rev. 382, 407-08 (1982) (arguing that special verdicts should be used in RICO cases to determine which predicate offenses the jury found to comprise the pattern of racketeering activity). Even where this Court has approved the use of such questions, it has reiterated its concerns that special interrogatories may unduly sway the jury in its decision regarding the defendant's guilt or innocence. *See United States v. Desmond*, 670 F.2d 414, 3d Cir. 1982; *United States v. Palmeri*, 630 F.2d 192, 3d Cir. 1980), *cert. denied*, 450 U.S. 967 (1981). We note, however, that in the present case the questions were to have been submitted *after* the verdict had been returned and the jury polled. Thus, the dangers usually involved in the use of jury interrogatories in a criminal case were not present here.

were intercepted. Viewing these statements in the light most favorable to the government, the jury could have found him guilty beyond a reasonable doubt of the predicate offenses.

There were four predicate offenses charged against Warrington: wire fraud and three gambling charges arising from the Reed Street craps game, the Andalusia craps game and the 1978 numbers operation. The wire fraud is supported by a series of intercepted conversations and interstate telephone calls. As to the gambling offenses, there are intercepted conversations in which Warrington discusses his involvement in all of the games. He was at the Reed Street location when it was raided by the FBI, and an FBI expert testified that, from the intercepted conversations it appeared that Warrington, along with four co-conspirators, had an on-going financial interest in the game. As to the numbers operation, in addition to intercepting conversations, the FBI searched Warrington's home and his business, the C. Warren Check Cashing Agency. At the home they found several envelopes of cash and a notebook which a government expert testified contained the records for the numbers business. From all this evidence, the jury could have found beyond a reasonable doubt that Warrington had committed all four of the predicate offenses with which he was charged.

Ciancaglini was accused of the following predicate offenses: extortionate credit transactions; collection of unlawful debt; mail fraud; and illegal gambling charges arising both from the numbers operations and from supervising the Reed Street craps game. There are intercepted conversations involving mail fraud and numbers charges from which the jury could have concluded beyond a reasonable doubt that Ciancaglini had committed those offenses.

Both the extortionate credit and unlawful debt accusations arose from Ciancaglini's participation in the

collection of the illegal loan made by Brown to Wilmerton. Although Ciancaglini never said anything when he accompanied Brown, he did admit in an intercepted conversation that he had been there to assist in the collection. He was present on one occasion when physical force was used. His later conversations with Harry Riccobene indicate that he knew that the debt was unlawful and that Brown was a loanshark. Thus, the evidence was sufficient as to these charges as well.

Ciancaglini raises a separate challenge to the jury's possible finding that he was involved in the collection of an unlawful debt. He claims that the district court gave inconsistent instructions to the jury on the issue of collection of an unlawful debt. At one point during the charge, the court stated that the collection of an unlawful debt could not serve as a predicate offense if more than five years old and at another point told the jury it could consider the collection of the Wilmerton debt, which seems to have occurred more than five years earlier. Ciancaglini did not, however, object to the jury instructions or request that the court withdraw the Wilmerton loan charge from consideration by the jury because it was time-barred. He also did not raise the issue in his motion for judgment of acquittal. Consequently, he cannot now raise this issue. *See Singleton v. Wulff*, 428 U.S. 106 (1976); *Caisson Corp. v. Ingersoll-Rand Co.*, 622 F.2d 672 (3d Cir. 1980); *Newark Morning Ledger Co. v. United States*, 539 F.2d 929 (3d Cir. 1976).

The final predicate offense charged against Ciancaglini was participation in the running of the Reed Street craps game. This accusation also formed the basis for the charge in Count II of the indictment — violation of the federal gambling statute (18 U.S.C. §1955). Since the jury acquitted Ciancaglini on Count II, he now argues that the acquittal establishes that reliance on the Reed Street game as a predicate offense would have

been improper. Because the jury returned only a general verdict of guilty on the RICO conspiracy charge, there is no way to determine if it did in fact bottom its verdict on the Reed Street activities. Accordingly, Ciancaglini asks that we reverse his RICO conviction on the basis of the *Brown* doctrine.

This case, however, differs from *Brown* in a very significant respect. In *Brown*, the jury had returned a verdict of guilty on both the RICO charge and the substantive crimes on which the RICO charge was based. When this Court reversed two of the substantive convictions, it had to strike down the RICO conviction as well, because the guilty verdicts on the substantive charges indicated that the jury might have relied on those charges as predicate offenses when considering the RICO claim.

By contrast, the jury in the present case *acquitted* Ciancaglini of the substantive crime of conducting an illegal gambling operation, which is prohibited by 18 U.S.C. §1955. The predicate offense alleged in connection with the Reed Street game is that Ciancaglini "would and did" violate 18 U.S.C. §1955. Thus, the verdict of acquittal on Count II serves a function analogous to that of a special interrogatory. Inasmuch as the jury stated affirmatively that it did not believe beyond a reasonable doubt that Ciancaglini had violated the federal gambling law, there is no reason for this Court to assume now that the jury returned inconsistent verdicts by relying on that charge as a basis for the RICO verdict. For this reason, *Brown* does not require that the conspiracy conviction here be reversed.

IV.

Several of the appellants raise additional challenges to the sufficiency of the evidence presented in connection with the various charges against them. Bongiovanni argues first that he never knew what the interest rates

were on the loans he was collecting, and so did not know that the rates were in violation of the usury laws. The stark facts are, however, that Bongiovanni discussed with Harry Riccobene his collections on the Abbott loan, that Abbott had paid $800 on a $1000 debt, that he still owed $400, and that, according to Bongiovanni, Abbott was paying $100 weekly. Inasmuch as Bongiovanni was aware of these figures, the jury could properly have inferred that he knew the interest rate charged, regardless of whether he actually made the necessary calculations.

Bongiovanni's second challenge is to the sufficiency of the evidence as to Count III, which related to his participation in the 1977 numbers operation. He maintains that the evidence shows that he was merely an employee of the game — taking bets from people — and thus cannot be considered to have "conducted" a gambling business as is required by Section 1955. Accepting Bongiovanni's assertion that he was an employee, we must still affirm his conviction. This Court has held explicitly that a "street runner" is covered by the Act. *United States v. Riehl*, 460 F.2d 454, 459 (3d Cir. 1972).

Warrington argues that the evidence does not establish his participation in the Reed Street game, the offense for which he was convicted in Count II. The evidence is adequate to establish Warrington's participation in the Reed Street game.[20] *See* Part IB4, *supra*.

Ciancaglini contends that there was insufficient evidence linking him to the operation of the Riccobenes' numbers game, the offense for which he was convicted

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20. Warrington "adopts" from the briefs of other appellants the argument that the jury instructions as to Count II were inadequate. Ciancaglini "adopts" a similar argument with respect to the charge in Count III. We are unable to locate a discussion of either issue in any brief. Absent any evidence of error, or allegation that the matters were properly raised before the district court, this Court cannot consider these claims.

in Count III. He acknowledges that he conducted a numbers game at the same time the Riccobenes' game operated, but claims that the evidence does not show that it was in fact the Riccobenes' game that he supervised. Ciancaglini's discussions with Harry Riccobene concerning the "cut numbers" policy, along with the other statements present in the record, are sufficient to warrant a jury finding that it was the Riccobene game with which Ciancaglini was involved.

V.

Appellants' next series of contentions involve the trial itself. They allege that the district court committed various errors warranting either the grant of a new trial or an acquittal. Appellants claim that the district court erred in permitting FBI Special Agent James Nelson to testify as an expert to define certain terms used on the tapes, such as "La Cosa Nostra," "capi," and "consigliere." Over the defendants' objections the testimony was admitted. The court limited the examination to a definition of the terms involved, and instructed the jury that the testimony was to be considered only for its definitional value. Our standard of review here is whether the district court abused its discretion by admitting the testimony for that limited purpose. These terms were not generally known, and there was considerable value in having the words explained to the jury. *See* Federal Rule of Evidence 702.

Nelson was particularly qualified to testify. He had participated in organized crime investigations for 12 years, had written various works on the subject, and had obtained information regarding this area from literature in the field, discussions with organized crime figures and transcripts of intercepted conversations. Moreover, one of the defense attorneys had stated earlier in the trial that "any agent [would be able to] get up there and testify what the terms were." 6 Tr. 294. Consequently,

we cannot say that it was an abuse of discretion to admit the testimony, especially in light of the limiting instruction given to the jury.

The second alleged trial error is raised only by Warrington. Warrington was represented in this case by Oscar Gaskins, Esquire. Gaskins worked with an associate, Ronald McGaskill, Esquire, and had assured the court that one or the other would be present at the trial. On the first day of trial, Warrington moved for a continuance on the ground that Gaskins had conflicting trial responsibilities that would require him to miss portions of the trial. The district court denied the motion, noting that all defendants and their counsel had known the trial date for two months, and that all the others had made arrangements to be available during this period. Also, Warrington's other attorney had the experience and capability to represent Warrington during Gaskins' absences. Gaskins was present during voir dire and opening statements, conducted some of the cross-examinations, and made the closing argument on his client's behalf. Warrington does not claim that McGaskill's representation was in any way inadequate. In light of all the circumstances, the denial of a continuance here was not an abuse of discretion. *See Morris v. Slappy*, 51 U.S.L.W. 4399, 4402 (U.S. April 20, 1983); *Ungar v. Sarafite*, 376 U.S. 575 (1964); *Paullet v. Howard*, 634 F.2d 117, 119 (3d Cir. 1980).

Bongiovanni adopts the argument that the district court erred in not granting him an acquittal on the ground that FBI wiretaps might have intercepted privileged attorney-client communications between Spirito and Spirito's lawyer during the course of the trial. Bongiovanni does not explain how the alleged violation of Spirito's rights affected him; he may believe that general matters of trial strategy were overheard. The district court held a series of *ex parte* hearings with the government to determine the validity of the assertions that the

attorney-client relationship had been invaded,[21] and ascertained that no violations of Spirito's sixth amendment rights had occurred. After reviewing the sealed transcripts of the *ex parte* proceedings, we conclude that the district court was correct; the attorney-client relationship was not violated. Accordingly, Bongiovanni's argument that he was collaterally harmed by any such violation is without merit.

VI.

Appellants' final argument is that the RICO statute violates their fifth and eighth amendment rights by imposing unduly harsh penalties for their activities. Among the offenses which may be considered as racketeering acts under Section 1961 are certain state crimes.[22] To constitute a predicate offense for RICO purposes, these crimes must be punishable under state law by periods of imprisonment longer than one year. The predicate racketeering acts in the present case arising out of the numbers operations and the Andalusia craps games are state law violations, prohibited by 18 Pa. Cons. Stat. §§5512-13. Although they carry maximum penalties of five years, these crimes are classified as misdemeanors by the Commonwealth. 18 Pa. Cons. Stat. §1104. Appellants urge that the imposition of the severe RICO penalties based on what they characterize as minor crimes is "cruel and unusual" and so fundamentally unfair as to violate their constitutional rights.

The argument is faulty in two major respects. First, we have previously explained the reason for the one-year limitation; it was "meant to limit RICO to serious

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21. The proceedings were conducted *ex parte* to avoid jeopardizing ongoing FBI investigations. Because the transcripts are sealed, we will not disclose the substance of any of the hearings.

22. 18 U.S.C. §1961(1)(A). The text of this provision is set out at n.16, *supra*.

offenses, offenses which in many but not all jurisdictions would be called felonies." *United States v. Davis*, 576 F.2d 1065, 1067 (3d Cir.), *cert. denied*, 439 U.S. 836 (1978). Thus, we need not be overly concerned with the labels a state chooses to attach to its crimes, so long as the violation falls within one of those categories of state offenses which Congress considered grave enough to form the basis for a federal crime.

Appellants' argument also misperceives the nature of a RICO violation. The predicate offenses referred to in the statute are not themselves the RICO violation, they are merely one element of the crime. The federal statute does not prohibit the commission of the individual racketeering acts. Rather, it bans the operation of an on-going enterprise by means of those acts. It was the enterprise that was seen by Congress to be the more serious and far-reaching problem. *See United States v. Forsythe*, 560 F.2d 1127, 1135 (3d Cir. 1977). Congress therefore determined that more serious sanctions were needed to prevent that type of continuing conduct. In light of the Supreme Court's recent decisions in *Hutto v. Davis*, 50 U.S.L.W. 3540 (U.S. Jan. 12, 1982) and *Rummel v. Estelle*, 445 U.S. 263 (1980), we cannot say that Congress exceeded its constitutional limits in setting the penalties for this crime, nor that the distict court did so by imposing the sentences it did in this case.[23]

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23. The appellants received the following sentences on the RICO conviction:

Mario Riccobene — Five years imprisonment (suspended) and five years probation to run following completion of his term of imprisonment of Count III.

Joseph Ciancaglini — Ten years imprisonment and a fine of $10,000.

Charles Warrington — Ten years imprisonment and a fine of $10,000.

Joseph Bongiovanni — Seven years imprisonment (suspended) and five years probation to run following completion of his term of imprisonment for Count III.

VII.

None of the claims raised by the appellants has persuaded us that reversible error was committed. Accordingly, the judgment of the district court in Nos. 82-1399, 82-1410, 82-1411, 82-1413 and 82-1414 will be affirmed. The judgment in 82-1412, relating to Pasquale Spirito, now deceased, will be vacated and that matter will be remanded to the district court with instructions to dismiss the indictment.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Harry Riccobene — Nine years imprisonment and a fine of $15,000.

APPENDIX "B"

STATUTES

APPENDIX "B-1"

§1961. Definitions

As used in this chapter [18 USCS §§1961 et seq.]—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 [29 USCS §186]

(dealing with restrictions on payments and loans to labor organizations) or section 501(c) [29 USCS §501(c)] (relating to embezzlement from union funds), or (D) any offense involving bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter [enacted Oct. 15, 1970] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending

money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter [18 USCS §§1961 et seq.];

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter [18 USCS §§1961 et seq.] or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter [18 USCS §§1961 et seq.];

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter [18 USCS §§1961 et seq.]. Any department or agency so designated may use in investigations authorized by this chapter [18 USCS §§1961 et seq.] either the investigative provisions of this chapter [18 USCS §§1961 et seq.] or the investigative power of such department or agency otherwise conferred by law.

(Added Oct. 15, 1970, P.L. 91-452, Title IX, §901(a), 84 Stat. 941; Nov. 2, 1978, P.L. 95-575, §3(c), 92 Stat. 2465.)

APPENDIX "B-2"

§1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code [18 USCS §2], to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engages in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

APPENDIX "B-3"

§894. Collection of extensions of credit by extortionate means

(a) Whoever knowlingly participates in any way, or conspires to do so, in the use of any extortionate means

(1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the nonrepayment thereof,

shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the nonrepayment thereof was punished by extortionate means.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence, at the time the extension of credit in question was made, of the circumstances described in section 892(b)(1) [18 USCS §892(b)(1)] or the circumstances described in section 892(b)(2) [18 USCS §892(b)(2)], and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing that words or other means of communication, shown to have been employed as a means of collection, in fact carried an express or implicit threat, the court may in its discretion allow evidence to be introduced tending to show the reputation of the defendant in any community of which the person against whom the alleged threat was made was a member at the time of the collection or attempt at collection.

(Added May 29, 1968, P.L. 90-321, Title II, §202(a), 82 Stat. 161.)

APPENDIX "B-4"

§1955. Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used this section —

(1) "illegal gambling business" means a gambling business which —

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but it not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

APPENDIX "C"

SELECTED INSTRUCTIONS, RULINGS, OBJECTIONS AND COLLOQUY FROM RECORD OF TRIAL

APPENDIX "C-1"

RULING ON REED STREET CRAPS GAME:

"The jury did not return a verdict of guilty as to the Reed Street Craps game under Count Two. That does not mean though that the jury could not have found that some overt act was not committed by him with respect to the Reed Street craps game for the purposes of Count One."

APPENDIX "C-2"

INSTRUCTION ON NEXUS OF PREDICATE ACTS:

"It is not necessary that the two racketeering acts be found to be acts of the same kind or nature so long as you find that beyond a reasonable doubt that two acts of racketeering activity occurred within the time specified, and that each was connected with the other by some common scheme, plan or motive, so as to constitute a pattern."

APPENDIX "C-3"

INSTRUCTION ON COLLECTION OF AN UNLAWFUL DEBT:

"First, that defendant Joseph Ciancaglini and co-conspirator Louis Fresta assisted co-conspirators Harry Brown and Marvin Greenblatt in collecting through extortionate means loans and interest due from Russell Wilmerton on or about January 1973, to on or about June 1974.

So to prove Ciancaglini's membership in the conspiracy, the Government must prove beyond a reasonable doubt that he agreed to commit any two of these particular racketeering acts or agreed to the collection of an illegal usurious debt from Russell Wilmerton."

• • •

And one of the acts for The Debt Collection must have occurred after February 18, 1976.

APPENDIX "C-4"

OBJECTION TO INSTRUCTION RE:
COLLECTION OF AN UNLAWFUL DEBT:

"MR. SIMONE: With regard to Russell Wilmerton's loan, that's another count. The evidence is that he didn't collect any money from Russell Wilmerton. He didn't threaten Russell Wilmerton. There's no evidence, in my opinion —

THE COURT: I've already treated your motion for —

MR. SIMONE: This is a motion with regard to that particular predicate offense in the racketeering. I object to the charge, Your Honor.

. . .

MR. SIMONE: Thank you. Now, with regard to collection of an unlawful debt, as it applies to Mr. Ciancaglini, there's no evidence with regard to the Wilmerton loan. There's evidence to the contrary that he didn't collect it.

THE COURT: Sir, do you have any objection to my charge?

MR. SIMONE: That's what I'm doing. I'm objecting to the charge.

THE COURT: This isn't an objection to the charge. This is a motion that you should have made —

MR. SIMONE: I made it.

THE COURT: And I ruled on it.

MR. SIMONE: And I'm making an objection to protect the record, Your Honor. Your Honor, I object to, during your charge, in the presence of the jury, Mr. Friedman handing a note to Your Honor in the middle of your charge, in the presence of the jury.

I have never seen it done before. I object to it and I think it's improper, and for the record, I move for a mistrial on that point.

MR. GASKINS: I join in that motion.

ALL DEFENSE COUNSEL: We join in that motion, Your Honor.

MR. SIMONE: I have nothing further, Your Honor."

APPENDIX "C-5"

OBJECTION TO ENTERPRISE INSTRUCTION:

"MR. NASUTI: If Your Honor please, I wasn't sure that — you may have included this. With respect to Count 1, that the jury has to find that there existed an enterprise as charged in that count. I don't know if you said that or not. You probably did.

THE COURT: I believe I said it in several ways."

APPENDIX "C-6"

INSTRUCTIONS AS TO "ENTERPRISE":

"Now, the conspiracy charged in this indictment is a special one. It's purpose must be to have any person employed by or associated with any enterprise, engaged in the activities of which affect interstate or foreign commerce, conduct or participate directly or indirectly in the conduct of such enterprise's affairs through a pattern of racketeering activity for collection of unlawful debt.

The term "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact, although not a legal entity.

An enterprise may be one which a group of individuals by their association has formed. It may engage in only one type of activity or in diversified activities. There is no restriction on the number and types of activities in which an enterprise may engage.

Indeed, an enterprise may have only one legitimate — strike that.

Indeed, an enterprise may have only legitimate purposes, illegal purposes or a combination of both legal and illegal purposes.

Now, what is meant by "employed by" or "association with" the enterprise?

If one aids or furthers the business or income of the enterprise, one is employed by or associated with it. A person is associated with an enterprise if he participates directly or indirectly in the conduct of the affairs of the enterprise.

You have to look at the person's behavior, not at the person's status. Therefore, one need not have an official position in the enterprise to be associated with it. One need not formally align one's self with an enterprise to be associated with it.

Associate has a plain meaning, a dictionary meaning. To join, often in a loose relationship, as a partnership, fellow worker, colleague, friend, or ally or companion, to join or connect with another. Thus, a person's actions may be very remote to the business of the enterprise or one's role in the enterprise may be very minor. A person still will be associated with the enterprise if he may be said to have somehow joined with the group of individuals, associated in fact to constitute the enterprise.

As I said before, the enterprise may not be a legal entity. It may be formed by the association of individuals.

The terms "conduct" and "participate" in the conduct of an enterprise, include the performance of acts, functions or duties which are necessary to or helpful in the operation of the enterprise.

A person may be found to conduct or participate in the conduct of an enterprise, even though he is a mere servant or employee, having no part in the management or control of the enterprise and no share in the profits.

Now, the Government is required to show beyond a reasonable doubt that the enterprise alleged in the indictment is engaged in or affects interstate commerce.

Interstate commerce means commerce or business between any place in one state and another place outside of that state. It also means commerce between places within the same state, but passing through any place outside of that state.

So if from the evidence you find beyond a reasonable doubt that there were conspirators who were part of an agreement to divide the proceeds of gambling operations in Trenton, between New York and Philadelphia, or that conspirators made interstate phone calls in connection with the enterprise's affairs, or that the Chestnut Hill Lincoln-Mercury dealership in interstate commerce, or that the conspirators traveled to another state to collect illegal debts, then the required effect has been established.

If you do not find that interstate commerce was affected, then you cannot find the defendants guilty under Count 1.

Now, what is a pattern of racketeering activity or collection of unlawful debt?

That means two or more acts of racketeering which occurred within ten years of each other or collection of one unlawful debt.

The term racketeering activity includes, one, collecting credit through extortionate means, mail fraud, wire fraud and conducting an illegal gambling operation.

I've already defined for you in connection with Counts 2 and 3 the meaning of conducting an illegal gambling operation. I will define the remaining types of racketeering activities in a few minutes. I will also define collection of unlawful debt shortly.

Now, under this conspiracy concept, there's a second element. A member in the conspiracy by agreement to participate in the conduct of the enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Now, under the second element, the Government must prove beyond a reasonable doubt that the defendant willfully became a member of the conspiracy by agreeing to participate in the conduct of the enterprise's affairs through a pattern of racketeering activity for collection of unlawful debt.

Now, one need not be a member of the enterprise. One may be employed by or associated with the enterprise. But one must become a member of the conspiracy before one can be found guilty.

One may become a member of a conspiracy without full knowledge of all the details of the conspiracy. On the other hand, a person who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspiracy.

Before the jury may find that a defendant or any other person has become a member of a conspiracy, the evidence in the case must show beyond a reasonable doubt that the conspiracy was knowingly formed and that the defendant or other person fact that they may have associated with each other and may have assembled together and discussed common aims and interests does not necessarily establish evidence of the existence of a conspiracy.

Also, a person who has no knowledge of a conspiracy, but who happends to act in a way in which it advances some object or purpose of a conspiracy, does not thereby become a conspirator.

Furthermore, mere knowledge of the conspiracy and its purposes does not establish membership in the conspiracy.

Before you may convict any defendant of this conspiracy, you must find that the evidence establishes beyond a reasonable doubt that defendant, by his own words or actions, objectively manifested an agreement to participate in directly or indirectly in the affairs of the enterprise specified in the indictment, by agreeing to commit two or more racketeering acts or the collection of one lawful debt.

It is not necessary that the two racketeering acts be found to be acts of the same kind or nature so long as you find that beyond a reasonable doubt that two acts of racketeering activity occurred within the time specified, and that each was connected with the other by some common scheme, plan or motive, that defendant.

In other words, to find the defendant guilty, you must find that he was a member of the conspiracy charged in the indictment and not some other conspiracy. In addition to the elements of conspiracy and membership in the conspiracy to agreement to conduct a pattern of racketeering activity or illegal debt collection, the Government must prove an overt act.

Now, I will just describe for you the two essential elements of a racketeering conspiracy. One, conspiracy with the object of having any person associated with an enterprise conduct or participate in the affairs of the enterprise through a pattern of racketeering or unlawful debt collection, and being employed by or associated with the enterprise, including agreement to commit two or more racketeering acts or one collection of unlawful debt.

The Government must also establish beyond a reasonable doubt that at least one of the overt acts, alleged in the indictment, occurred while the conspiracy was still in existence.

In your consideration of the evidence in the case as to the offense of conspiracy charged you should first determine whether or not the conspiracy existed as alleged in the indictment. If you conclude that the conspiracy did exist, you should next determine whether or not the accused willfully became a member of the conspiracy.

If it appears beyond a reasonable doubt from the evidence in the case that the conspiracy alleged in the indictment was willfully formed, and that the defendant willfully became a member of the conspiracy, either at its inception or afterwards, and that thereafter, one or more of the conspirators knowingly committed one or more of the overt acts charged in furtherance of some object or purpose of the conspiracy, then there may be a conviction even though the conspirators may not have succeeded in accomplishing their common objective or purpose, and in fact, may have in so doing.

The extent of any defendant's participation moreover is not determinative of his guilt or innocence. A defendant may be convicted as a conspirator even though he may have played only a minor part in a conspiracy.